Supreme Court, U.S.
FILED
FEB 28 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1007

In the Supreme Court of the United States

OCTOBER TERM, 1985

PAUL DICARO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the grand jury testimony of a witness who feigned complete amnesia at trial is admissible under Fed. R. Evid. 801(d)(1)(A), as a prior inconsistent statement, and under the Confrontation Clause of the Sixth Amendment.

2. Whether petitioner's conviction for violating the Hobbs Act, 18 U.S.C. 1951, should be reversed on the ground that he was prejudiced by evidence admitted in connection with a count that was reversed on appeal for failure of the indictment to state an offense.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 772 F.2d 1314.

JURISDICTION

The judgment of the court of appeals was entered on September 3, 1985. A petition for rehearing was denied on October 4, 1985 (Pet. App. 1b). The petition for a writ of certiorari was filed as of December 3, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on one count of conducting the affairs of an enterprise through a pattern of racketeering activity, in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962(c), and one count of interfering

with interstate commerce by committing an armed robbery, in violation of the Hobbs Act, 18 U.S.C. 1951.[1] He was sentenced to ten years' imprisonment on the Hobbs Act conviction and five years' probation on the RICO count. The court of appeals affirmed petitioner's Hobbs Act conviction and reversed the RICO conviction (Pet. App. 1a-28a).[2]

1. The evidence adduced at trial, the sufficiency of which is not in dispute, showed that petitioner, along with a varying band of associates, carried out a series of armed robberies, burglaries, and thefts, as well as an attempted murder, over a seven-year period from September 1970 to January 1978. Seven criminal acts were charged as predicate acts for the racketeering count; one of these acts, an armed robbery of a Chicago grocery store known as the Halsted Foods Center, Inc., also served as the basis for the Hobbs Act charge. The evidence offered to prove the Hobbs Act offense, like that offered to prove the other crimes, consisted principally of testimony from accomplices who had also participated in the robbery.[3]

The Halsted Foods robbery occurred on January 19, 1978 (4 Tr. 135-136). On that day, according to the testimony of David Willis, one of the participants, he, Ronald Brown, and Joe Zito "cased" the store (3 Tr. 17). They watched as a Brinks Company armored car arrived and the guards took several bags of money inside (3 Tr. 17-18). The night janitor arrived at about 8:00 p.m. and the store closed

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[1]Petitioner's co-defendant, Michael Gurgone, was also charged in Count 2 with violating the Hobbs Act, but he was acquitted at trial.

[2]The United States has not sought review by this Court of the court of appeals' ruling on the RICO count.

[3]Because petitioner's conviction on the RICO count was set aside by the court of appeals, we will not discuss the facts underlying that offense except as it bears on petitioner's Hobbs Act conviction.

shortly thereafter (4 Tr. 134-135). Willis, Zito, and Luanne Walz then continued the surveillance in order to learn the janitor's routine (3 Tr. 18-19). After they finished, they returned to Walz's home and picked up Brown (3 Tr. 19-20). After donning ski masks, Willis, Zito, and Brown drove back to Halsted Foods in a car that Willis and Brown had previously stolen (3 Tr. 20).

At the store, Willis helped Brown climb a nearby telephone pole and then returned to the car to wait (3 Tr. 20-21). Zito talked with Brown by means of a walkie-talkie while Willis listened to a police scanner. A few minutes later, Brown gave Willis a gun and told him to watch the janitor, who had been handcuffed and tied to a chair (*ibid.*). Willis saw two more men, whom he identified at trial as petitioner and Gurgone, enter the store carrying acetylene tanks and a hose (3 Tr. 22-25). While Willis guarded the janitor, the others went to the front of the store, where the offices and safes were located. Willis then smelled something burning and heard crackling and popping noises coming from the office (3 Tr. 23-25). Finally, Willis left the store with Zito and Brown, and they returned to Walz's home where they divided the money taken from the store (3 Tr. 25-27).

2. As corroboration for Willis's testimony, the government called Ronald Brown, who twice before had implicated petitioner in the Halsted Foods robbery in testimony before a federal grand jury in 1979 and 1982. However, in a voir dire conducted outside the jury's presence, Brown stated that he did not recall going to Halsted Foods on the night of the robbery; he further stated that he would invoke his Fifth Amendment privilege with respect to any aspect of his testimony before the grand jury (2 Tr. 13-14). The district court then issued an order submitted by the prosecutor granting Brown use immunity and compelling him to testify

(2 Tr. 14-15; 4 Tr. 171-172, 174). The court also appointed an attorney to advise Brown as to his obligations under the order (2 Tr. 15-18; 4 Tr. 174).

After consulting with Brown, his appointed counsel reported to the court that Brown intended to claim amnesia (4 Tr. 196-221). In another voir dire, Brown denied having any memory of the crimes about which he had testified before the grand jury and said he was currently being given three doses of valium a day while being housed at the Metropolitan Correctional Center (MCC) (4 Tr. 222-236).

The court conducted a final voir dire of Brown the following day. Brown stated that he had no memory of anything prior to March 29, 1983, when he was arrested by police officers who pointed shotguns at his head and threatened to shoot him (2 Tr. 41-42). When the court asked him about a medical report indicating that on May 5, 1983, Brown had told a doctor at the MCC about a gunshot wound he had suffered in 1973, Brown admitted that he had told a doctor about the gunshot wound, but he claimed he could not remember when he had been shot. He still maintained he could remember nothing that had occurred prior to March 29, 1983 (2 Tr. 43-44).

The district court found that Brown's claim of amnesia was false and that his feigned claim of memory loss was equivalent to a denial of the truth of his prior grand jury testimony. As the court put it, " I equate * * * the current 'No, I suddenly don't remember anything' with the inconsistent statement, 'No, that didn't happen' when there has been testimony previously under oath that it did" (2 Tr. 55).[4] Accordingly, the court held that Brown's in-court

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[4]The court summarized its ruling as follows (2 Tr. 64):

> Well, let me amplify in one respect. I'm not saying that Mr. Brown is unavailable; he's here.

testimony was inconsistent with his grand jury testimony, and that his grand jury testimony was therefore admissible at trial as a prior inconsistent statement under Fed. R. Evid. 801(d)(1)(A). 2 Tr. 54-56.

Brown was then called to the stand in the presence of the jury and questioned by the government and defense counsel. In response to each of the prosecutor's questions regarding his grand jury testimony itself and the underlying events recounted therein, Brown answered that he did not remember (2 Tr. 66-71).[5] Under questioning by defense counsel, Brown described the event that led to his claimed amnesia, and he testified about his current use of valium, his pending state court indictment, and claimed harassment and threats against him by federal agents (2 Tr. 74-81).

The court then read to the jury portions of Brown's grand jury testimony of September 12, 1979, and September 22, 1982. In this testimony, Brown had offered a description of the Halsted Foods robbery that was quite similar to the testimony that Willis had given at trial. Brown added some further details, explaining that he had entered the store by cutting a hole in the roof and then had handcuffed and blindfolded the janitor. He said that he, petitioner, and Gurgone had brought some acetylene torches and used them to open the safes. While petitioner and Gurgone were working on the safes, Willis looked after the janitor, Zito held up a tarpaulin to hide the light from the torches, and

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> I am saying that it is my conclusion that his claim of memory loss is not so, and that therefore any testimony in that regard is inconsistent testimony, and that he is subject to cross-examination in the sense that anybody who is telling one story, whatever that story is, who is physically present and able to respond can be cross-examined regarding that story.

[5]Brown did admit, however, that he remembered being in the Federal Witness Protection Program, that he was married, had a child, and supported his wife and child (2 Tr. 81, 85).

Brown acted as a look-out. Finally, Brown said the robbery had lasted six or seven hours and netted the burglars about $3,000, which they divided afterwards at Walz's house (2 Tr. 90-101).

After Brown's grand jury testimony had been read to the jury, the defense was allowed to impeach Brown by reading from his testimony in other unrelated cases in state and federal courts. Brown admitted in this testimony to being a lifelong burglar and acting as a government informant in exchange for cash payments, sometimes giving false information in order to conceal his own criminal activities. He also described his participation in the Federal Witness Protection Program from 1979 to 1982, during which period he received a total of $20,000 from the federal government. It was also stipulated that Brown was not prosecuted for a number of crimes in exchange for his cooperation with the state and federal government (2 Tr. 135-179, 186-229).

3. The court of appeals affirmed in part and reversed in part (Pet. App. 1a-28a). The court vacated petitioner's conviction on the RICO count (*id.* at 8a-11a),[6] but upheld his conviction on the Hobbs Act charge, finding that the admission of Brown's grand jury testimony violated neither the Federal Rules of Evidence nor the Confrontation Clause of the Sixth Amendment (Pet. App. 11a-26a).

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[6]The court of appeals reversed petitioner's conviction on the RICO count because petitioner had been charged and convicted as both the "person" who had conducted the affairs of an enterprise through a pattern of racketeering and as the "enterprise" itself (Pet. App. 8a-11a). The court relied on an earlier decision by the same court, handed down while this case was pending on appeal, which held that Congress did not intend to allow the same entity to be charged as both the person and the enterprise under 18 U.S.C. 1962(c). *Haroco, Inc.* v. *American National Bank & Trust Co.*, 747 F.2d 384 (7th Cir. 1984), aff'd on other grounds, No. 84-822 (July 1, 1985).

The court of appeals first upheld the district court's finding that Brown's grand jury testimony was admissible under Fed. R. Evid. 801(d)(1)(A). Relying on a long line of cases holding that "inconsistent" statements are not limited to statements that are diametrically opposed to a witness's in-court testimony, and that a claim of memory loss at trial, particularly in a case of a witness who is manifestly reluctant to testify, can render a witness's prior statements inconsistent with his trial testimony, the court of appeals held that the district court did not abuse its discretion in finding that Brown's claimed amnesia was inconsistent with his grand jury testimony (Pet. App. 12a-15a). After carefully considering the text, history, and purposes of Rule 801(d)(1)(A), the court also found that, "under the very unique circumstances presented by this case, [Brown] was meaningfully subject to cross-examination under Rule 801(d)(1)(A)" despite his feigned lack of memory (Pet. App. 16a). As the court explained, the limited cross-examination of Brown that defense counsel was able to perform, together with the testimony given by Brown in other trials that the defense used to impeach him, revealed that he had been a member of the Federal Witness Protection Program and had received substantial payments from the government during the period in which he testified before the grand jury. This evidence, the court held, "enabled the defense to create a reasonable basis for the jury to conclude that Brown's statements in his grand jury testimony were tainted by a desire to please the government" (*id.* at 18a-19a). Brown's feigned amnesia was also significant, the court held, because "his credibility in making this claim would doubtlessly affect the jury's willingness to believe his prior statements" (*id.* at 20a). In addition, the defense was able to impeach Brown's credibility through the use of the statements that he had made at other trials. In that testimony, Brown admitted to facts that, when considered as a whole, "hardly [present] the profile of a credible

witness" (*ibid.*). In sum, given this evidence, which provided the defense with a reasonable basis for arguing to the jury that Brown should be disbelieved, the court concluded that "defense counsel in this case could hardly have hoped for a more powerful impeachment of Brown than that which they achieved through his testimony at trial and the introduction of his prior statements" (*id.* at 21a). Accordingly, the court found that it would be "the height of formalism" (*ibid.*) to conclude that Brown was not subject to cross-examination concerning his grand jury testimony for purposes of Rule 801(d)(1)(A).

For the same reasons, the court also concluded that Brown's purported amnesia did not deprive defense counsel of a meaningful opportunity to cross-examine him under the Sixth Amendment Confrontation Clause. Pet. App. 21a-26a. In so ruling, the court relied heavily upon the extensive questioning Brown underwent regarding his feigned claim of amnesia, the jury's ability to assess Brown's credibility based upon his responses to those questions, and petitioner's ability to impeach Brown with the testimony that he had given in other trials. *Id.* at 25a. Given this evidence, the court held that, in spite of Brown's memory lapse, "in the unique situation presented here, the jury had ample information from which it could assess the truth of Brown's grand jury testimony." *Id.* at 25a-26a (footnote omitted).

ARGUMENT

1. Petitioner contends that the admission of Ronald Brown's grand jury testimony violated the Federal Rules of Evidence and the Confrontation Clause of the Sixth Amendment. After a close examination of the record in this case and a careful analysis of petitioner's claims, the court of appeals correctly rejected petitioner's contentions in an exhaustive opinion upon which we substantially rely. Moreover, there is no conflict among the circuits on the

questions presented by petitioner. Finally, the unique facts of this case are unlikely to recur with the degree of regularity necessary to warrant review by this Court. Accordingly, petitioner's claims do not call for further review.

a. Petitioner contends (Pet. 6-8) that Brown's grand jury testimony was inadmissible under Fed. R. Evid. 801(d)(1)(A) as a prior inconsistent statement because he could not cross-examine Brown concerning his grand jury testimony, given Brown's claim of amnesia. Petitioner claims that Brown's grand jury testimony was admissible, if at all, only under Rule 804(b)(5), and he argues that Brown's grand jury testimony was inadmissible under this rule because it was not trustworthy. Petitioner's objection is not well taken.

In the first place, the court of appeals correctly held that Brown's grand jury testimony was admissible under Fed. R. Evid. 801(d)(1)(A). Contrary to petitioner's claim (Pet. 7), the use of that rule to admit the prior sworn testimony of a forgetful witness is not unprecedented. As the court of appeals recognized (Pet. App. 13a), a number of other courts of appeals have ruled that, in some cases, a witness's feigned partial memory loss is not materially different from the disavowal of the truth of a prior statement, particularly where the witness is recalcitrant or reluctant to testify. In those situations, the witness's prior statement falls within the scope of Rule 801(d)(1)(A). See, *e.g., United States* v. *Russell,* 712 F.2d 1256, 1258 (8th Cir. 1983); *United States* v. *Murphy,* 696 F.2d 282, 284 (4th Cir. 1982), cert. denied, 461 U.S. 945 (1983); *United States* v. *Distler,* 671 F.2d 954, 958 (6th Cir.), cert. denied, 454 U.S. 827 (1981); *United States* v. *Marchand,* 564 F.2d 983, 998-999 (2d Cir. 1977), cert. denied, 434 U.S. 1015 (1978); *United States* v. *Rogers,* 549 F.2d 490, 495-496 (8th Cir. 1976), cert. denied, 431 U.S. 918 (1977); see also 4 D. Louisell & C. Mueller, *Federal Evidence* § 419, at 175-176 (1980) (footnotes omitted) ("the inconsistency requirement is satisfied not only when the

prior statement directly contradicts the declarant's trial testimony, but also when declarant claims at trial a lack of memory concerning the events related in the prior statement, at least where the selectivity of the claimed memory loss suggests that the witness is being evasive rather than truly forgetful"). This principle stems from the general rule that a witness's prior statement need not directly contradict his trial testimony to qualify for admission under Rule 801. See *United States* v. *Williams*, 737 F.2d 594, 607-608 (7th Cir. 1984), cert. denied, No. 84-256 (Feb. 25, 1985); *United States* v. *Rogers*, 549 F.2d at 495-496; 4 D. Louisell & C. Mueller, *supra*, § 419, at 175-177.

This case illustrates the reasonableness of that principle. After personally observing Brown insistently maintain that he was suffering from total amnesia, the district court found that his claim was a complete fabrication (pages 4-5 note 4, *supra*).[7] That finding is not clearly erroneous. Brown initially invoked his self-incrimination privilege, a claim that he would have been most unlikely to assert if he was truly suffering from amnesia. The MCC medical report showed that, more than a month after Brown had supposedly developed amnesia, he was able to remember the incident that supposedly triggered that condition. And Brown's in-court responses to questioning by the government and defense counsel gave the district court a substantial basis for finding that Brown was lying (Pet. App. 4a-5a, 14a-15a). The court of appeals saw no reason to disturb that finding (*id.* at 14a-19a & n.6), and petitioner does not

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[7]As the district court explained (2 Tr. 122-124):

> Brown was up on the stand. So the jury could judge [h]is demeanor as to what kind or how big a liar he is, if any, that when he says, looks you straight in the eye and says something that everybody knows to be a fact, "I don't remember," it doesn't shut you off from cross-examination any differently or any more than his looking you in the eye and saying: No, that didn't happen.

challenge it in this Court. Thus, it is beyond dispute that Brown's claim of amnesia was a lie.

Petitioner erroneously asserts (Pet. 7) that the court of appeals denigrated the importance of cross-examination in ruling that Brown's grand jury testimony was admissible under Rule 801(d)(1)(A). On the contrary, the court of appeals stressed the importance of this requirement in the rule and acknowledged that a witness's complete memory loss will normally mean that the witness is not subject to cross-examination concerning his prior statement (Pet. App. 17a). Although the court found that Brown was effectively subject to cross-examination concerning his testimony before the grand jury, the court so ruled only after undertaking a careful examination of the record in this case and finding that Brown's in-court testimony and his testimony in other trials provided the defense with a substantial basis for arguing that Brown should be disbelieved. The court of appeals therefore did not adopt a sweeping rule that a witness's feigned amnesia permits the government routinely to introduce the witness's prior statements under Rule 801(d)(1)(A); rather, the court simply found that, on the peculiar facts of this case, petitioner had an adequate opportunity to cross-examine Brown regarding his prior statements.

b. Petitioner also claims (Pet. 4-6) that the admission of Brown's grand jury testimony violated his right of confrontation under the Sixth Amendment and that the court of appeals' decision conflicts with *Pointer* v. *Texas*, 380 U.S. 400 (1965), and *Douglas* v. *Alabama*, 380 U.S. 415 (1965). This claim also lacks merit.

This Court has explained that "the mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that 'the trier of fact [has] a satisfactory basis for

evaluating the truth of the prior statement.' " *Dutton* v. *Evans,* 400 U.S. 74, 89 (1970) (plurality opinion), quoting *California* v. *Green,* 399 U.S. 149, 161 (1970). Accordingly, the Court has held that the admission of a declarant's prior inconsistent statements incriminating a defendant does not violate the Sixth Amendment so long as the accused has the opportunity for a "full and effective cross-examination" of the declarant at trial. *California* v. *Green,* 399 U.S. at 158. Although *Green* did not decide whether a witness's memory loss can so hamper cross-examination as to render the admission of the witness's out-of-court statements a violation of the Confrontation Clause (399 U.S. at 168-169), the courts of appeals that have considered this question have found, in varying factual circumstances, that a declarant's memory loss did not violate the defendant's confrontation right. See *United States* v. *Rogers,* 549 F.2d at 498-502; *United States ex rel. Thomas* v. *Cuyler,* 548 F.2d 460 (3d Cir. 1977); *United States* v. *Payne,* 492 F.2d 449 (4th Cir.), cert. denied, 419 U.S. 876 (1974); *United States* v. *Insana,* 423 F.2d 1165 (2d Cir.), cert. denied, 400 U.S. 841 (1970); see also *United States* v. *Baker,* 722 F.2d 343, 347-349 (7th Cir. 1983), cert. denied, 465 U.S. 1037 (1984); *Vogel* v. *Percy,* 691 F.2d 843 (7th Cir. 1982); cf. *Delaware* v. *Fensterer,* No. 85-214 (Nov. 4, 1985), slip op. 4 ("it does not follow that the right to cross-examine is denied * * * whenever the witness's lapse of memory impedes one method of discrediting him").[8] The ruling of the court of appeals in this case is fully consistent with these other decisions.

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[8]The decision most closely resembling this one is *United States* v. *Payne, supra.* There, the court of appeals upheld, over a Confrontation Clause challenge, the admission of a witness's prior written statement to a federal agent after the witness claimed at trial to have no memory of the facts underlying his statement or that he made it. The court explained that the witness was available for cross-examination concerning other contemporaneous events, about any possible bias or prejudice, and as to why he failed to recall both the substance of his statement

The court of appeals found that Brown's feigned amnesia did not completely disable petitioner from attempting to impeach Brown. The defense was able to reveal that Brown was a member of the Federal Witness Protection Program and had received substantial payments from the government at the time that he testified before the grand jury. This allowed the defense to argue that Brown may have been motivated by a desire to please the government. Pet. App. 18a-19a. Moreover, the government's proof at trial showed that petitioner had ordered Brown to be killed and that two other associates of petitioner had attempted to carry out petitioner's order. See Gov't C.A. Br. 6-7.[9] This proof allowed the defense to argue that Brown was also motivated by vengeance at the time that he testified before the grand jury. Beyond that, Brown admitted at several other trials that he was not only a career criminal but also an inveterate liar, who would lie when necessary to help himself. Pet. App. 20a. Finally, the transcript of the grand jury proceedings provided a verbatim record of Brown's testimony, which eliminated any realistic possibility that his statements were not accurately preserved. Pet. App. 18a n.5. In these circumstances, the court of appeals correctly found that this case was not materially different from the other court of appeals decisions upholding the admission of a witness's

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as well as making it. The court of appeals found that, in that circumstance, the jury had an adequate basis for determining the veracity of the out-of-court statement and that the declarant's memory lapse did not preclude the admission of his out-of-court statement under the Confrontation Clause. 492 F.2d at 452-454. The court of appeals here followed the same approach, finding that the extensive questioning regarding Brown's amnesia that did take place here amounted to a full and effective cross-examination that allowed the jury to assess the truth of Brown's previous statements.

[9]This evidence formed the basis for one of the predicate acts in the RICO count against petitioner that was reversed on other grounds by the court of appeals. See page 6 note 6, *supra*.

prior inconsistent statements where the witness feigns amnesia at trial.[10]

Petitioner erroneously asserts that the court of appeals' decision conflicts with *Pointer* v. *Texas, supra,* and *Douglas* v. *Alabama, supra.* As the court of appeals noted (Pet. App. 26a n.7), *Pointer* is readily distinguishable from this case. There, the state introduced the prior testimony given at a preliminary hearing at which the defendant had been unrepresented by counsel and at which he did not cross-examine the witness. This Court found a violation of the

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[10]The Court's decision in *Dutton* v. *Evans, supra,* is also pertinent here. There, the Court found no Confrontation Clause objection to the admission of a declarant's out-of-court statements that did not fit within a well-established hearsay exception because it found that there were sufficient "indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant." 400 U.S. at 89 (plurality opinion); see *id.* at 88-89 (discussing indicia of reliability). Those factors have parallels in this case.

First, although Brown's grand jury testimony contained assertions of fact rather than opinions, his responses to questions at trial clearly gave the jury fair warning that his grand jury testimony should be received with care. Second, Brown had first-hand knowledge whether petitioner was involved in the Halsted Foods robbery, since Brown was himself a participant in that crime. In fact, the district court permitted the government to introduce only those portions of his grand jury testimony in which he related his personal knowledge of the events (2 Tr. 56). Brown's grand jury testimony was also corroborated in part by the trial testimony of one of petitioner's other associates (Willis testified that he saw petitioner in the Halsted Foods store on the night of the robbery, see Pet. App. 26a-27a & n.8). Third, there was no reason to suspect the accuracy of Brown's recollection of the events before the grand jury, particularly given the corroboration provided by Willis. Fourth, petitioner had an opportunity to impeach Brown at trial, as discussed in the text. In addition, Brown testified before the grand jury under oath and thereby exposed himself to a prosecution for perjury if he chose to lie. Accordingly, the district court's decision to admit Brown's grand jury testimony was consistent with *Dutton.*

Sixth Amendment because the defendant had no opportunity whatever to confront the witness at trial. Here, by contrast, Brown did appear at trial and was subject to questioning regarding his claim of amnesia. Similarly, in *Douglas* v. *Alabama, supra,* an alleged accomplice of the defendant's refused to testify at trial against the accused, and the prosecutor read to the jury the accomplice's confession, which incriminated the defendant. In that case, too, the accused had no opportunity to confront the witness at trial. In this case, by contrast, Brown was available for some questioning at trial, and the court of appeals found that the combination of Brown's responses to those questions and the introduction by petitioner of Brown's statements at other, prior trials and hearings resulted in an effective cross-examination (Pet. App. 20a-21a).[11]

2. Petitioner also claims (Pet. 8-9) that his Hobbs Act conviction should be reversed on the ground that the admission against him of evidence relevant to the reversed RICO count had a prejudicial spillover effect in connection with the Hobbs Act count. He argues that the court of appeals failed adequately to consider this spillover effect because it failed to take into account the invalidity of the racketeering count. However, the court of appeals correctly applied the

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[11]There is also no need to hold this case pending the Court's decision in *New Mexico* v. *Earnest,* cert. granted, No. 85-162 (Oct. 21, 1985), which is factually similar to *Douglas.* There, a co-defendant refused to testify at trial after being granted use immunity and being held in contempt, and his taped confession to the police was admitted against the respondent. The question in *Earnest* is whether a co-defendant's confession that incriminates the accused may be admitted at trial, consistently with the Confrontation Clause, under an exception to the hearsay rule for statements against the declarant's penal interest, where the co-defendant/declarant is unavailable at trial, an issue that the Court reserved in *Bruton* v. *United States,* 391 U.S. 123, 128 n.3 (1968). Here, by contrast, petitioner was not wholly deprived of any opportunity to confront Brown at trial, nor was the prior statement an unsworn confession obtained during police interrogation.

well-settled rule that the reversal of one count of a defendant's conviction does not automatically require that other counts independently supported by sufficient evidence also be set aside (Pet. App. 11a-12a n.4). See, *e.g.*, *United States* v. *Shue*, 766 F.2d 1122, 1133-1134 (7th Cir. 1985); *United States* v. *Valenzuela*, 596 F.2d 824, 829 (9th Cir.), cert. denied, 441 U.S. 965 (1979). Instead, the proper inquiry is whether the different counts should have been severed because of their potential prejudicial effect. See *Schaffer* v. *United States*, 362 U.S. 511 (1960). The court of appeals held that the initial joinder was proper and that the district court did not abuse its discretion in finding that a severance was not required (Pet. App. 11a-12a n.4). Under those circumstances, reversal of one of the counts on appeal does not impair the integrity of the conviction on the other count.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1986

DOJ-1986-02